Supreme Court, U.S.
FILED
JUL 16 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

71-87

No. 71-

WILLIAM G. HERRING, JR., *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

James W. Cobb
Counsel for Petitioner
815 - 5th Street, N.W.
Washington, D.C. 20001

Of Counsel:

MITCHELL, ELLIS & SHORTER
508 Fifth Street, N. W.
Washington, D. C. 20001

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

INDEX

	Page
Opinions Below	2
Jurisdiction	2
Question Presented	2
Constitutional Provisions Involved	2
Rules Involved	3
Statement of the Case	4
Reasons Relied on for the Allowance of the Writ	9
Conclusion	12
Appendix	1a

TABLE OF CASES

Gearhardt v. United States, 106 U.S. App. D.C. 270, 273, 272 F. 2d 499, 502 (1959) 11

Hawk v. United States, 119 U.S. App. D.C. 269, 340 F. 2d 792 (1964) 11

Kerchevel v. United States, 274 U.S. 220, 47 S. Ct. 582, 71 L. ed. 1009 (1927) 9, 11

United States v. Joslin, ..., U.S. App. D.C. ..., 434 F. 2d 526 ( ) 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 71-

WILLIAM G. HERRING, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

To: The Honorable The Chief Justice of the United States and the Honorable Associate Justices of the Supreme Court of the United States

The petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered on June 16, 1971, affirming the judgment and conviction entered against the petitioner in the United States District Court for the District of Columbia.

OPINIONS BELOW

There was no opinion in the United States District Court for the District of Columbia, only a judgment affirming the judgment of the District Court, which is appended hereto.

There was no written opinion of the United States Court of Appeals judgment rendered June 16, 1971, affirming the lower court.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia sought to be reviewed was dated and entered on June 16, 1971.

The jurisdiction of this Court is invoked under Section 1254 of Title 28 of the United States Code and Rule 37(b) of the Federal Rules of Criminal Procedure.

QUESTION PRESENTED

In a federal criminal case where the accused seeks to withdraw his plea of guilty before sentencing upon grounds that are "fair and just", is he not deprived of his constitutional right to due process of law and the assistance of counsel, where the District Judge does not permit him to confer with counsel before he makes a statement giving him reasons for wanting to withdraw his plea, and the court brushes aside his remarks; and does not the failure to exercise reasoned judicial discretion in favor of granting the application seriously and impermissibly impinge upon the right to jury trial.

CONSTITUTIONAL PROVISIONS

Amendment 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person

be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment 6

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense.

Federal Rules of Civil Procedure

Rule 11. Pleas

A defendant may plead not guilty, guilty or, with the consent of the court, *nolo contendere*. The court may refuse to accept a plea of guilty, and shall not accept such plea of *nolo contendere* without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea. If a defendant refuses to plead or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a plea of not guilty. The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea.

As amended Feb. 28, 1966, eff. July 1, 1966.

Rule 32. Sentence and Judgment

(d) Withdrawal of Plea of Guilty. A motion to withdraw a plea of guilty or of *nolo contendere* may be made

only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.

STATEMENT OF THE CASE

The petitioner, William G. Herring, during the period relevant in this case, was the president of two business corporations located in Bethesda, Maryland. One, National Commercial Corporation, mainly distributed residential fire and burglary alarm and intercom systems; the other, Nationwide Enterprises Inc, sold home water softners and conditioners. Charles H. Bannack, Jr., the petitioner's cousin was employed by both corporations and carried the title "vice-president." They were both indicted by the Federal Grand Jury in the District of Columbia in United States District Court Criminal Case No. 718-69, for 12 counts of mail fraud (violation 18 U.S. Code, Section 1341) in connection with the operation of the two corporations. The case was assigned to the Honorable June L. Green, District Judge. A jury trial of the case commenced on October 8, 1969 and continued until October 17, 1969. The Court, toward the end of the Government's case, declared a mistrial in response to motions of both defendants based on the actions of the prosecutor in repeatedly eliciting improper testimony from its homeowner witnesses.

While the case was awaiting retrial, the Grand Jury returned another indictment against Herring and Barrack charging them with many offenses of forgery and uttering, in violation of 22 D.C. Code, Section 1401. This indictment accused the defendants of forging homeowners, and in some instances, salesmen's names to deeds of trust arising out of the operation of the water softener and intercom system businesses, and representing to others to their benefit that the forged documents were genuine. This latter case was scheduled for trial on May 11, 1970. On

this said date, the prosecutor told the court that he was ready for trial. He further advised the Court that the defendants' attorneys had informed him that there was to be a disposition, meaning a guilty plea, in the case. He also told the court that by agreement the two indictments were to be consolidated. The attorneys representing both defendants formally moved for consolidation of the two cases and indicated to the Court that both defendants were prepared to plead guilty to the first count in the mail fraud case. The Court thereupon had the Clerk administer the oath to both defendants, and then separately advised and interrogated them in accordance with Rule 11, Federal Rules of Criminal Procedure. After this the court accepted the defendants' pleas of guilty to Count one of the mail fraud indictment. The matter was referred to the Probation Office of the Court for presentence investigation and report.

On July 27, 1970, the defendants Herring and Barrack, appeared with their attorneys before Judge Green for sentencing.

Before the sentencing proceedings began counsel for the petitioner told the Court that Herring "has indicated to me a very strong desire amounting to a direction to me to withdraw his guilty plea that has previously been entered and to be permitted to stand trial on these two indictments." Counsel stated to the Court the petitioner's reasons for wanting to withdraw his plea of guilty as he understood them: On the day the forgery case was set for trial the decision was made to enter a plea of guilty to Count 1 of the mail fraud case with the understanding that all the remaining criminal charges in both cases would be dismissed. The decision to enter a plea of guilty by the defendant Herring was based upon a concern about the government's evidence, which was very strong against Barrack. Because of Herring's dominant position in the businesses, and because Barrack was a relative of his, he was influenced to plead guilty. The defendant Herring

felt that Barrack's conduct would reflect against Herring because of their family relationship and because of "Herring's position in the business." Thus, counsel continued, the decision was made to plead guilty. This was based on the indirect effects of the strong government case against Barrack. Counsel further told the Court that the defendant Herring had afterwards reflected on the wisdom of making a guilty plea and realized that one of the considerations that influenced his decision, that is, his ownership interest in the businesses, redounded against him in the total picture. Counsel next said to the Court that the defendant's desire to withdraw his plea of guilty was based upon considerations of his family and business, which would be affected if he should let his plea of guilty stand. Counsel indicated that these were good faith considerations.[1]

The Court called the defendant Herring forward and had the Clerk administer the oath to him. The Court then called his attention to the fact that when he entered the plea he was sworn and asked certain questions to which he made certain responses. The Court said it was reminding him of this to determine whether any of his answers were incorrect. The Court then went through all of the questions put to the defendant Herring and his answers at

[1] After counsel for Herring made his statement the Court said tht it would pass the matter for a moment and find out from Mr. Barrack what his situation was. After a private conference between Barrack and his lawyer, his attorney said that they were not going to move to withdraw his plea. Thereupon, Barrack's attorney and he made statements in mitigation of sentence. Before the Court imposed sentence, counsel for the government said to the Court that the government would prefer that both defendants go to trial if the Court were going to grant the defendant Herring's motion to withdraw his plea. The Court responded that Barrack had pleaded guilty, it had been accepted by the Court, and the Court was going to sentence him. The Court said that it would deal with the Herring matter after that. The Court then sentenced Barrack.

the time he entered the guilty plea. At the finish of this, the Court then asked him: "Now, what exactly has changed besides the day of reckoning." At this point Herring's counsel asked permission of the Court to speak to his client. The Court refused to let him do so. The following then occurred:

. . . .

"DEFENDANT HERRING: Well, I think many things have come up that my feeling in discussing it with the District Attorney that it would be a long drawnout trial the other way and a mental, financial burden would come upon me; and they were willing to accept that particular plea and . . .

. . . .

"DEFENDANT HERRING: And I felt that in running a business and taking care of my family, maybe, financially, I don't think I could have gone any further; and if I ran a company, I realize I am responsible for what happens in it. I am truly sorry. I know I have to face whatever I've done wrong.

"If I've done what has been purported to have been done wrong, I didn't have any indication of any Governmental regulatory objection to my business when I was in it.

"THE COURT: Well, all of these things would go to mitigation of the sentence. The question is what has changed that would require you to withdraw your plea of guilty at this time or cause you to withdraw your plea of guilty, other than the day of sentencing?

"DEFENDANT HERRING: I just feel that maybe I would rather take my chances on the trial.

"THE COURT: All of that was determined at the time you asked this Court to accept your plea of guilty, and the Court will not accept your withdrawal of your plea if that is your only reason at this time.

"Are any of the things that I have read to you different, in fact, from what you stated?

"DEFENDANT HERRING: Not differently, but the connotations at the time might have been different, my

feeling as to—that I felt like I should have probation, that I have a good background.

"THE COURT: I am confident that you would not have stated to this Court that you had no promise or representation by anyone as to what sentence will be imposed by this Court.

"DEFENDANT HERRING: I didn't say that any promises were made.

"THE COURT: Or representations by anyone as to what sentence will be imposed by this Court.

"So it is now you thought that you now wish to withdraw your plea because you fear you will go to jail? Is that the reason?

"DEFENDANT HERRING: Well, I would say, probably so.

"THE COURT: The Court declines to accept your withdrawal of the plea, Mr. Herring, and will, therefore, impose sentence.

"Do you wish to direct your comments to anything having to do with the sentence? I will be glad to hear from you on that."

The defendant Herring and his attorney made statements to the Court in mitigation of sentence and the Court then sentenced him to imprisonment for not less than 18 months and not more than 5 years. The government moved to dismiss all remaining counts. The Court granted the motion as to both defendants. An appeal was taken to the United States Court of Appeals for the District of Columbia Circuit by the petitioner on the ground that the district court erred in failing to grant him leave to withdraw his plea of guilty. Without oral argument, pursuant to Local Rule 11(e), the Circuit Court affirmed the judgment of the lower Court on June 16, 1971.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

The withdrawal of a plea of guilty before sentence is controlled by Rule 32(d) of the Federal Rules of Criminal Procedure. The Petitioner Herring contends that under the peculiar facts in this case, it was an abuse of the District Court's discretion to refuse to permit him leave to withdraw his guilty plea and to be permitted to have a jury trial of the various charges against him. This abuse of judicial discretion deprived him of his right to due process as protected by the Fifth Amendment and amounted to an effective denial of his free right to enjoy a jury trial under the Sixth Amendment. Upon review, the Circuit Court affirmed the actions of the District Court. The judgments of these lower courts, both reaching the same result, represent an application of the provisions of Rule 32(d) that: (1) is inconsistent with the plain meaning of the Rule; (2) is contrary to the expression of this Court in the case of *Kerchevel* v. *U. S.*, 274 U.S. 220, 47 S. Ct. 582, 71 L. ed. 1009 (1927); and (3) is in derogation of the petitioner's right to a jury trial.

In the proceedings in the District Court where the petitioner presented his oral motion to withdraw his guilty plea, it was clearly shown that he had bona fide reasons to do so. The petitioner, untrained in the law, as best he could, told the Court why he wanted to go to trial. His statements in this regard, though not a model of clarity or elocution, referred to strong personal, business and family reasons for wanting to have his right to a jury trial. It must be noted that before he began to speak in this vein his lawyer asked the Court to let him speak to the petitioner. The Court refused to do so and compelled him to make his statement without the benefit of words of advice or counseling from his lawyer. At this point the Court had sharply brought to the petitioner's attention that at the time he entered his plea of guilty he had been sworn on oath and answered a series of questions put to him by the Court. The Court evidenced an attitude

that, regardless of petitioner's desires and reasons therefor, it was firmly opposed to the idea. The Court showed no understanding of the petitioner's predicament and made no effort to explore his reasons with an attitude of fairness. The Court listened to what the petitioner had to say with an apparent closed mind. The petitioner in a meaningful sense therefore was not afforded "due process" and the Court was not minded to receive the petitioner's application with a view to exercising reasoned judicial discretion. The case of *U. S.* v. *Joslin*, ..., U.S. App. D.C. ..., 434 F. 2d 526, decided by the Circuit Court emphasizes that in such a proceeding due process requires a fair hearing:

> "The rule is that when, as here, an effort is made to withdraw a guilty plea before sentence the defendant is entitled to an appropriate hearing before the application can be denied. Where factual matters bearing directly on the plea are truly in controversy, an oral colloquy is not an acceptable vehicle for resolving them. In this instance, the subjects of appellant's mental state and his understanding of his action at the time of the pleas should have been dealt with, not in the form of colloquy or argument, but by 'the following of at least the rudimentary procedural channels for the determination of disputed questions of facts.' *United States* v. *Mainer*, 383 F. 2d 444, 447 (3rd Cir. 1967)."

A person who pleads guilty is not permitted, of course, as a matter of absolute right to withdraw his plea of guilty; and the petitioner does not here contend for such a rule. A common sense interpretation of Rule 32(d) is that opportunity is afforded to do so. The Rule cannot be applied in such a fashion so as to make the privilege meaningless. When an application to withdraw a plea of guilty before sentence is made in good faith, the Court must fully and fairly hear the grounds for it, give due consideration to the applicant's predicament and exercise a sound judicial discretion in ruling upon it. It would seem that the granting of such motions should be the rule rather

than the exception. In the case of *Kerchevel* v. *U. S.*, *supra*, this Court said more than 40 years ago:

> ". . . But, on timely application, the court will vacate a plea of guilty shown to have been unfairly obtained or given through ignorance, fear or inadvertence. Such an application does not involve any question of guilt or innocence. Com. v. Crapo, 212 Mass. 209, 98 N. E. 702. The court in exercise of its discretion will permit one accused to substitute a plea of not guilty and have a trial if for any reason the granting of the privilege seems fair and just. Swang v. State, 2 Coldw. 212, 88 Am. Dec. 593; State v. Maresea, 85 Conn. 509, 83 Atl. 635; State v. Nicholas, 46 Mont. 470, 472, 128 Pac. 543; State v. Stephens, 71 Mo. 535; People v. McCrory, 41 Cal. 458, 461; State v. Coston, 113 La. 717, 720, 37 So. 619; Bishop, New Crim. Proc. § 747. . . ."

This principle has been followed, though sparingly, by the Circuit Court. See *Gearhardt* v. *U. S.*; 106 U.S. App. D.C. 270, 273, 272 F. 2d 499, 502 (1959); and *U. S.* v. *Joslin*, *supra*. The proper application of the standard expressed in Rule 32(d) takes into account the very fundamental and vaunted right of trial by jury. As a matter of fact, this consideration, because of its constitutional dimensions, must and should be overriding. The Bill of Rights contains no value more important than this. Circuit Judge Fahy's concurring opinion in the case of *Hawk* v. *U. S.*, 119 U.S. App. D.C. 269, 340 F. 2d 792 (1964), puts the matter in correct focus:

> "The question is not answered by the fact that the guilty plea was validly entered. The right to withdraw such a plea is not conditioned upon its invalidity. The question is whether, notwithstanding its validity when entered, the court should, in the exercise of that sound discretion applicable to this problem, permit it to be changed. In answering the court should give weight to the place trial by jury is accorded in our system of administering criminal justice. On the background of the fundamental right the courts give gen-

erous latitude to an accused who wishes to go to trial rather than to adhere to a plea of guilty previously entered."

CONCLUSION

The question presented to this Court herein provides a factual record based upon proceeding in which the petitioner brought himself within the application of Rule 32(d). The trial court and the circuit court did not apply the proper standard in reaching its respective judgments. If such a practice continues there will be a complete erosion of the right to jury trial. There is no area in federal criminal law proceedings that is more wanting for a clear and unequivocal expression from this court, in its supervisory role, than to enunciate that leave to withdraw pleas of guilty before sentence requires that judicial discretion operate more favorably for the accused. This case presents an appropriate vehicle for this long needed direction.

Respectfully submitted,

JOHN A. SHORTER, JR.
Attorney for Petitioner

Of Counsel:

MITCHELL, ELLIS & SHORTER
508 Fifth Street, N. W.
Washington, D. C. 20001

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Criminal 718-69
Filed June 16, 1971

[no opinion]

September Term, 1970

No. 24,609

UNITED STATES OF AMERICA

v.

WILLIAM G. HERRING, JR., *Appellant.*

Appeal from the United States District Court for the District of Columbia

Before: WILBUR K. MILLER, Senior Judge, and MCGOWAN and ROBB, Circuit Judges.

Judgment

This case came on for consideration on the record on appeal from the United States District Court for the District of Columbia, and briefs were filed herein by the parties. While the issues presented occasion no need for an opinion, they have been accorded full consideration by the Court. *See* Local Rule 13(c). On consideration of the foregoing, it is

ORDERED AND ADJUDGED by this Court that the judgment of the District Court appealed from herein is hereby affirmed.

Per Curiam

For the Court:

NATHAN J. PAULSON
Nathan J. Paulson
Clerk

Dated: June 16, 1971.

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-87

WILLIAM G. HERRING, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner and another were charged in two indictments returned in the District of Columbia with mail fraud and forgery. On May 11, 1970, the day the forgery indictment was set for trial, petitioner pleaded guilty to one count of the mail fraud indictment. At the subsequent sentencing hearing, petitioner moved to withdraw the guilty plea. The district judge denied the motion and sentenced petitioner to imprisonment for not less than 18 months and not more than 5 years, and the court of appeals affirmed *per curiam* (Pet. App.).

The single contention petitioner makes here is that the trial judge abused her discretion in denying the motion to withdraw the guilty plea. Petitioner and his cousin Charles Barrack were initially charged with

441-850—71

twelve counts of mail fraud violations under 18 U.S.C. 1341, in connection with the operation of two corporations of which petitioner was president and Barrack was vice-president. A trial on this indictment resulted in a mistrial on October 17, 1969. While the case was awaiting retrial, petitioner and Barrack were charged in another indictment with twenty-four counts of forgery in violation of 22 D.C. Code 1401 and 105.

On the date set for trial of the forgery indictment (May 11, 1970), the prosecutor announced ready and stated that he had been informed by defense counsel of an intended guilty plea (Tr. 2).[1] The trial judge consolidated the two cases, whereupon defense counsel stated that petitioner and Barrack would plead guilty to one count of the mail fraud indictment. After full compliance with Rule 11, Federal Rules of Criminal Procedure, the judge accepted the guilty pleas to one count. The judge then continued the case for a presentence report (Tr. 16).

On the day of sentencing, petitioner's counsel told the court that petitioner "had indicated to me a very strong desire amounting to a direction to me to withdraw his guilty plea that has previously been entered and to be permitted to stand trial on these two indictments" (S. Tr. 3).[2] Counsel explained that the decision to plead guilty to one count of mail fraud

[1] "Tr." refers to the transcript of the hearing on May 11, 1970, which is on file in the United States District Court for the District of Columbia.

[2] "S. Tr." refers to the transcript of the sentencing hearing on July 27, 1970, which is on file in the United States District Court for the District of Columbia.

was made on the understanding that all other charges in both indictments would be dismissed (S. Tr. 3–4), and was heavily influenced by the strong case the government had against Barrack and the fact that Barrack's conduct would reflect unfavorably against petitioner (S. Tr. 4–5). Barrack did not seek to withdraw his guilty plea and the judge sentenced him to imprisonment for not less than nine nor more than forty months (see S. Tr. 5–9).

The judge then sought to ascertain from petitioner personally the reasons for his withdrawal request. During the course of this inquiry, the judge read to petitioner the questions and answers at the time that he pleaded guilty (S. Tr. 10–12; see Pet. 7–8). In substance, petitioner admitted to the judge that the reason for the decision to withdraw was that he feared a jail sentence. The judge denied the motion to withdraw and, after hearing statements from petitioner and his attorney in mitigation, sentenced him and granted the government's motion to dismiss all remaining counts in both indictments (S. Tr. 14–22).

On this record, it is plain, we think, that the district judge did not abuse her discretion in denying petitioner's motion to withdraw the guilty plea. While a district court should "vacate a plea of guilty shown to have been unfairly obtained or given through ignorance, fear or inadvertence," *Kercheval* v. *United States,* 274 U.S. 220, 224, this case involved none of these factors. Petitioner's reasons for desiring to withdraw the guilty plea—that he was motivated to plead guilty by personal business and family reasons, that he felt he would now rather take his chances on a

trial, and that he feared that if the plea were not withdrawn he would go to jail—were insufficient grounds to require the judge to permit withdrawal. Compare *High* v. *United States,* 288 F. 2d 427, 431–432 (C.A. D.C.), certiorari denied, 366 U.S. 923. Petitioner made no claim that he was innocent (see *Everett* v. *United States,* 336 F. 2d 979, 982 n. 10 (C.A. D.C.)), and did not assert any defense unknown to him at the time of the guilty plea. Nor, contrary to petitioner's assertion, was it unreasonable for the judge to request that petitioner give reasons for the withdrawal in his own words, without interrupting the hearing to consult privately with counsel.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

AUGUST 1971.

U.S. GOVERNMENT PRINTING OFFICE: 1971